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Supreme Court, U.S.
FILED
MAR 4 - 2010
OFFICE OF THE CLERK

No. 09-923

In the Supreme Court of the United States

MAHER ARAR,

Petitioner,

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER

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March 4, 2010

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INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York[1] was founded in 1870 and has been dedicated since that date to maintaining the highest ethical standards of the profession, promoting reform of the law, and providing service to the profession and the public. With its nearly 23,000 members, the Association is among the nation's oldest and largest bar associations.

The Association has long been committed to protecting, preserving and promoting civil liberties, civil rights, and the democratic process. Through its standing committees, including those on Civil Rights, Federal Courts, Federal Legislation, Military Affairs and Justice, and International Human Rights, the Association seeks to assure protection of Americans' fundamental constitutional rights even, or especially, in times of crisis and to ensure that the demands of national security do not undermine the guarantees of civil liberties that are the hallmark of our constitutional democracy.

This case is of compelling interest to the Association, to the American people and to our nation's commitment to the rule of law. It is essential

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given appropriate notice of amicus curie's intention to file. The United States has filed a blanket consent and the consents of the other parties are being lodged herewith.

to preserve the ability of U.S. federal courts to remedy constitutional violations of the most brutal kind — state-orchestrated secret detention and torture of individuals carried out in a way designed to circumvent judicial review and accountability. Such constitutional violations must have remedies, and those remedies depend, under our system of law, on an independent judiciary providing meaningful review of executive-branch action. The decision of the U.S. Court of Appeals for the Second Circuit is a roadmap for the executive branch to circumvent that review even when carrying out torture-based inquisitions. Because such conduct is not compatible with American constitutional principles, it may not be exempted from judicial scrutiny. The Association therefore submits this brief, as a Friend of the Court, in support of the Petition of Maher Arar requesting that this Court grant *certiorari* to review the decision of the U.S. Court of Appeals for the Second Circuit in *Arar v. Ashcroft*, 585 F. 3d 559 (2d Cir. 2009).

SUMMARY OF ARGUMENT

In this case, the executive branch violated an individual's constitutional rights and usurped the role of the judiciary by having Maher Arar ("Arar") shipped overseas for torture based on discredited information collected by executive officials prior to Arar's arrest. To ensure there would be no review of the basis for his detention and the risk that he would be tortured, those executive officials effectively displaced the judiciary and actively denied Arar access to the courts prior to his delivery to Syria's torturers.

As the case now stands, no one from the executive branch will be held accountable for the alleged conspiracy to torture Arar. Instead, the Second Circuit has set out a roadmap for the

executive to continue conspiring to torture in a consequence-free environment. The test for judicial review created by the Second Circuit in this case is an abdication of the federal courts' constitutional role as an independent and co-equal branch of government that is required to remedy violations of constitutional rights. Under the Second Circuit's novel test, executive officials can arrange for torture without consequence, as long as an attorney from the executive branch eventually drafts a brief mentioning that national security was at stake.

The Second Circuit's decision undermines judicial independence by ensuring that there will be no judicial review of constitutional violations in cases involving national security. This Court should grant the Petition for Certiorari and, on review, reject the Second Circuit's test as inconsistent with the role of the law in our nation and the role of federal courts in enforcing that law.

ARGUMENT

I. REVIEW SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION UNDERMINES ESSENTIAL CONSTITUTIONAL PROTECTION

Our Constitution applies "to our rulers and people, equally in war and in peace." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 12-21 (1866). The defendant executive officers allegedly violated the Constitution, and the judicial branch must now determine whether those officers are responsible and, if so, provide a remedy. The failure of the Second Circuit of the Court of Appeals to hold the defendants accountable for the alleged constitutional violations in this case, instead deferring to the executive branch's broad assertions of national

security, erodes our constitutional guarantees for citizens and all who come into contact with U.S. government officials. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

A. The Second Circuit's Decision Allows Executive Action Depriving Arar of Constitutional Rights to Go Unchecked

The purpose of the remedy established in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), "is to deter individual federal officers from committing constitutional violations." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). The Second Circuit decision in this case held that the actions taken by the defendants were in a "new context" of *Bivens* claims and declined to recognize a cause of action.[2] There is nothing new about the context of the defendants' actions. The Magna Carta limited the authority of kings so that no man be would be "imprisoned... or banished" without judicial review. Art. 39, in *Sources of Our Liberties* 17 (R. Perry & J. Cooper eds. 1959). Alexander Hamilton recognized the "confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten," as one of the "favorite and most formidable instruments of tyrants." Federalist No. 84, p.474 (Isaac Kramnick ed. 1987). In this case, the defendants blocked Arar's access to judicial review before secretly hurrying him off to be tortured in a Syrian jail. These actions are such an

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[2] *Arar v. Ashcroft*, 585 F. 3d 559, 563 (2d Cir. 2009).

established method of tyranny that they were banned within the Constitution and have been recognized as a basis for *Bivens* causes of action. U.S. Const. amend. V (guaranteeing right to a notice of charges and an opportunity to be heard); Art. 1, § 9, cl. 2 (guaranteeing right to judicial review of executive detention); *Arar v. Ashcroft* (Parker dissent), 585 F.3d at 597-98 (listing cases recognizing *Bivens* causes of action for such violations).

The Second Circuit fails to recognize the defendants' constitutional violations, instead proclaiming a single "new context" — the "delivery of a non-citizen to a foreign country for torture" [3] —and holds that the courts must wait for Congress to determine whether a victim of such constitutional violations should have a remedy.[4] Under the Second Circuit's rationale, "a new context" could as easily be coined involving the delivery of a citizen to a foreign country for torture and, as long as the executive officials could successfully employ force and deception to block the citizen from filing a *habeas corpus* petition, no cause of action would lie against the executive officials that chose to participate in those actions. The Second Circuit's rationale leaves executive officials unconstrained by either the Constitution or statutes and unchecked by the courts.

Failure of an independent judiciary to check the executive leads to gross violations of constitutional rights, particularly during times of perceived crisis. *See Korematsu v. United States*, 323 U.S. 214 (1944) (Supreme Court defers to executive assertions of power and allows Japanese-

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[3] *Arar*, 585 F. 3d at 572.

[4] *Id.* at 564-65.

American internment). Recent executive efforts to evade judicial review of gross constitutional violations are well documented. *See, e.g., Senate Armed Services Committee Report on the Treatment of Detainees in U.S. Custody* (detailing executive's broad assertions of power facilitating torture).[5] We rely on the courts to hold executive officials accountable for constitutional violations, even in times of perceived crisis. "In times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." *Korematsu v. United States*, 484 F. Supp. 1406 (N.D. Cal. 1984) (*coram nobis* case).

Longstanding authority recognizes the role of the courts as the appropriate, indeed indispensable, check on the executive. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976); *see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 US 50 (1982) (quoting Federalist Papers); Retired Federal Judges' Amicus Brief.

As explained below in Point II, the test set out by the Second Circuit for recognizing a cause of action under *Bivens* allows the executive to decide when the judicial branch will have the opportunity to check the executive. This test, vesting the executive with the unilateral authority to determine when a claim may stand, is contrary to the constitutional

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[5] *See* p. 32 (describing memos drafted by presidential aides advising agencies that federal anti-torture statues do not apply to interrogations ordered by the President) and p. 33 (CIA torturers considered the memos a "golden shield").

role of an independent judiciary. When *Bivens* claims are pleaded, executive officers are the defendants, not disinterested magistrates. The Constitution does not anticipate the judiciary's ceding its powers to the executive. *United States v. Nixon*, 418 U.S. 683, 704 (1974) (judicial power cannot be shared with the executive).

B. The Absence of a Statutory Remedy Favors Recognition of a Judicial Remedy for Executive Constitutional Violations

Despite the Second Circuit's willingness to permit the defendants to avoid accountability, the Constitution requires a judicial forum when a constitutional right is at stake. *Crowell v. Benson*, 285 U.S. 22 (1934) (upholding the legality of an administrative court in part because the statute at issue did not prohibit constitutional claims from being brought in Article III courts). Here, Arar alleged that executive officials detained him while changing planes in New York City, denied him access to his attorney and the courts, and conspired with third parties to have him interrogated under torture in a country known by the government to torture detainees.[6] Rather than recognize a cause of action

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[6]Arar's allegations are strongly corroborated by the report of the Office of Inspector General for the Department of Homeland Security, which carried out an independent investigation of the defendants' actions that substantially confirms the allegations in the complaint. Department of Homeland Security, Office of Inspector General, *The Removal of a Canadian Citizen to Syria, OIG-08-18* (March 2008) ("OIG Report"). The Canadian government also performed an independent investigation of its role in Arar's abuse, which further verifies the allegations in the complaint. Arar Comm'n, *Report of the Events Relating to Maher Arar* (2006) ("Canadian Report").

for these constitutional violations, the Second Circuit denied Arar a judicial forum, holding that the court must wait for Congress to provide a legislative remedy for these constitutional violations.[7]

The Second Circuit misconstrues the role of the courts in remedying constitutional violations. The judiciary's constitutional role is protecting against constitutional violations perpetrated by the executive and providing a remedy under *Bivens* when there is no statutory remedy. *Bush v. Lucas*, 462 U.S. 367 (1983) (declining to recognize a *Bivens* claim where legislative remedial scheme already provided a remedy). The Second Circuit turns this obligation on its head by citing the absence of a legislative remedial scheme as a reason to dismiss Arar's claim and allow constitutional violations to continue without remedy.[8] *See, contra, Bivens*, 403 U.S. at 397 (allowing damages where there is no "explicit congressional declaration" that plaintiffs must pursue another remedy "equally effective in the view of Congress"); *Ex parte Young*, 209 U.S. 123 (1908) (in the absence of statutory authority, the court may issue relief for constitutional violations). In doing so, the Second Circuit has abdicated its duty to protect constitutional guarantees. *See Ex parte Quirin*, 317 U.S. 1, 19 (1942) (it is the duty of the courts to preserve constitutional safeguards). Although Congress can displace the *Bivens* remedy by enacting an alternative statutory remedy,

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[7] *Arar*, 585 F. 3d at 564-65.

[8] *Id.* at 565 ("Congress has not prohibited the practice [of extraordinary rendition], imposed limits on its use, or created a cause of action").

legislative inaction supports, rather than undercuts, recognition of a *Bivens* remedy.[9]

C. The Executive's Actions to Deprive a Detainee of Access to the Courts Are Constitutional Violations That Require a Remedy

A basic principle of our society is the right to be heard before being condemned. *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The executive's use of deception and force to deny Arar access to court violated the Fifth Amendment to the U.S. Constitution and willfully undermined separation of powers. *See Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008) (only the judiciary can decide where *habeas corpus* applies). In other cases where the executive sought to act unilaterally, it claimed the constitutional power to do so. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (asserting war

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[9] In addition, the U.S. is a signatory to the Convention Against Torture, which requires a remedy for torture victims. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.S.T.S. 85, entered into force June 26, 1987, art. 14. The State Department has assured the United Nations that victims of torture by federal officials can find the obligatory remedy in *Bivens* actions. *See* U.S. Dep't of State, United States Written Response to Questions Asked by the United Nations Committee Against Torture 10 (bullet-point 5) (Apr. 28, 2006), *available at* http://www.state.gov/documents/organization /68662.pdf; U.S. Dep't of State, *United States Report to the Committee Against Torture*, ¶ 51 (bullet-point 5), U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf; *see also* Petitioner's Brief; Canadian Human Rights Organizations and Scholars Brief. Denial of a *Bivens* cause of action removes an essential remedy to ensure compliance with U.S. treaty commitments.

powers); *United States v. Nixon*, 418 U.S. 683 (1974) (asserting executive privilege); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (asserting inherent authority). In the present case, the executive exercised a *de facto* power without even claiming support from the Constitution. By keeping Arar in a maximum security holding cell, interrogating him without notifying his attorney,[10] falsely telling him that his attorney had been informed of the interrogation and chose not to attend,[11] serving him with an essentially blank order of removal form to satisfy a five-day notice requirement,[12] and then filling in the blanks en route to his transfer to Syria[13] to ensure that no *habeas* petition could be timely filed,[14] the executive repeatedly resorted to unlawful and unconstitutional deception and force to deny Arar access to court. Denying federal court review of an administratively issued order of removal is illegal. *INS v. St. Cyr*, 533

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[10] OIG Report, p. 19.

[11] *Id.* at p. 25.

[12] *Id.* at pp. 14-15 ("under the section 235(c) proceeding... he was given 5 days to respond... [h]owever, the form did not specify the underlying reasons for the section 235(c) proceeding, nor did it inform Arar of the country to which he would be removed").

[13] *Id.* at p. 30 ("On Monday, October 7, 2002... the INS Commissioner signed the memorandum that authorized Arar's removal to Syria ... At approximately 4:30 a.m. on Tuesday, October 8, 2002, Arar was served with the I-148 [with notice of his removal to Syria] while being transported to an airport in New Jersey.").

[14] *Id.* at p. 31 ("INS attorneys believed that Arar and his attorney would have had the opportunity to review the I-148 after its issuance and INS attorneys expected the 'inevitable habeas' to be filed at any time. However, that opportunity was never realized as Arar was removed immediately after service of the I-148.").

U.S. 289, 297, 314 (2001) (construing a statute not to bar an alien's *habeas* petition so as to avoid the serious constitutional questions raised by denying a forum for *habeas* review); *see also Bounds v. Smith*, 430 U.S. 817 (1977) (denial of access to courts is unconstitutional); *Ex parte Hull*, 312 U.S. 546, 549 (1941) ("the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of *habeas corpus*").

Where, as here, the past acts of government officials make it impossible for a person to assert legal rights in court, damages are the appropriate remedy. *Christopher v. Harbury*, 536 U.S. 403 (2002). The two-part test of *Harbury* requires (1) the existence of a non-frivolous legal claim that had been frustrated by the defendants' behavior and (2) the impossibility of obtaining adequate compensation by pursuing the underlying legal claim in a contemporaneous judicial forum. 536 U.S. at 415-16. Judicial review of either the removal order (which included the knowingly false determination that Arar was not likely to be tortured in Syria) or a *habeas corpus* petition would have shielded Arar from being delivered by defendants to Syria's torturers. Undoubtedly for that reason, the defendants actively denied Arar access to such legal relief. Arar satisfies the *Harbury* two-part test and, therefore, damages are the appropriate remedy.

II. REVIEW SHOULD BE GRANTED BECAUSE THE *BIVENS* "SPECIAL FACTORS" ANALYSIS ADOPTED BY THE SECOND CIRCUIT ABANDONS THE COURTS' ROLE AS THE GUARDIAN AGAINST UNCONSTITUTIONAL EXECUTIVE CONDUCT

The *Bivens* "special factors" analysis applied by the Second Circuit permits the executive to determine when executive constitutional violations cannot be redressed. Under the Second Circuit's test, if a judge would "pause even to consider" the appropriateness of a *Bivens* cause of action, no damages claim will be recognized.[15] The judges "do not take account of countervailing factors."[16] No affirmative factor favoring a *Bivens* remedy raised by the plaintiff will be considered, and the defendant's mere mention of a so-called "special factor" precludes the cause of action. Such "analysis" is not judicial review but rather supine obedience to the executive and an evisceration of judicial independence.

This purported "analysis" provides a perverse incentive for the executive branch to assert "special factors" when its actions are most culpable and would not otherwise withstand scrutiny from an independent judiciary. This case is a prime example. The Canadian Report on Arar makes clear that the "national security" concerns raised by the executive were either wrong or exaggerated. The Canadian information initially provided to the INS on Arar was "either completely inaccurate or, at a minimum, tended to overstate his importance" in an ongoing Canadian investigation.[17] The error was

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[15] *Arar*, 585 F. 3d at 574.

[16] *Id.* at 574, n. 7.

[17] Canadian Report, p. 113.

immediately brought to the attention of the INS. A fax sent to "American authorities" on October 4, 2002, while Arar was being held by INS, said that Canada was "unable to indicate that Mr. Arar had links to al-Qaeda."[18] Telephone conversations between intelligence officers in Canada and the INS, while Arar was still in U.S. custody, further established that Canada did not have information linking Arar to al-Qaeda.[19] That the INS chose to disregard that information while arranging for Arar's torture would, under any judicial analysis, be weighed against the executive's bald assertions that national security was at stake. Instead, the Second Circuit has invented a test that invites the executive to assert, as it did here, "national security" issues simply to avoid judicial review of actions that could not otherwise withstand any measure of scrutiny from an independent judiciary.

A. Denial of Judicial Review in This Case Violates Due Process Under the Constitution

Blocking Arar's access to court to ensure that he could not have his detention reviewed violated the Constitution in at least three ways. First, access to court is a constitutional guarantee. *See Tennessee v. Lane*, 541 U.S. 509 (1988). In this case, the defendants' use of deception and force to block access to court was a constitutional violation.

Second, the Constitution requires a hearing at a meaningful time and in a meaningful manner. *Boddie v. Connecticut*, 401 U.S. 371 (1971). In this case, the administrative decisions that Arar was an inadmissible alien and that he would not be tortured

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[18] *Id.* at p. 114.

[19] *Id.* at p. 153.

in Syria could have been reviewed by a court. By deceiving his lawyer and serving Arar with a reviewable administrative decision while he was already in transit to Syria, the defendants actively denied a hearing at a meaningful time.[20] The decision was never forwarded to Arar's attorney.[21] Such acts are unconstitutional and an affront to the independence of the judicial branch and to our entire system of justice.

Third, destruction of legal claims is a violation of due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (negligent destruction of a legal claim is a violation of due process). Here, the defendants' intentional destruction of Arar's legal claims for review of unconstitutional administrative decisions, by blocking access to court by force and deception, violated constitutional due process guarantees. *See Webster v. Doe*, 486 U.S. 592 (1988) (requiring judicial review of constitutional claims associated with administrative decisions).

The "special factors" analysis as applied by the Second Circuit denies a remedy for these constitutional violations by denying review of Arar's claims. Recognition of Arar's claims would not inhibit any lawful government actions and no contrary Congressional intent exists. Indeed, U.S. statutes and court cases forbid the actions allegedly taken against Arar. 18 U.S.C. § 2441 (prohibiting torture for the purpose of obtaining information); 18 U.S.C. § 2340A(c) (prohibiting conspiracy to torture abroad); 8 U.S.C. § 1231 (barring removal of any person to a country where he will likely be tortured); 28 U.S.C. § 2241 (providing statutory authority to

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[20] OIG Report, p. 30.

[21] *Id.*

grant writ of *habeas corpus*); *see also Wilkie v. Robbins*, 551 U.S. 537 (2007) (declining to recognize a *Bivens* claim that would inhibit lawful executive acts). The need for the assertion of the rule of law here is acute and requires a *Bivens* remedy to provide a check on executive violations of due process.

B. The Bivens "Special Factors" Analysis, as Applied by the Second Circuit, Subjects the Courts to Executive Manipulation and Vitiates Meaningful Review of Constitutional Violations

The *Bivens* "special factors" analysis applied by the Second Circuit prevents the judiciary from implementing procedures, such as *in camera* review, that address the executive's concerns while preserving the constitutional remedy. Open court proceedings safeguard against attempts to use the courts as instruments of persecution;[22] this causes the Second Circuit to pause to consider whether to recognize a *Bivens* cause of action where *in camera* review of secret documents may be required. In the Second Circuit's view, that hesitation slams the court's door on those whose torture was arranged by the defendants and then classified as "secret" by those same defendants.[23] Requiring dismissal based on "hesitation" creates a perverse incentive for reflexive decisions and prevents thoughtful evaluation and development of the record at the district court level. Here, the Second Circuit denied a remedy for constitutional violations because any decisions the district court might reach based on reviewing documents *in camera* might lead some

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[22] *Arar*, 585 F. 3d at 577.

[23] *Id.*

observers to assume a miscarriage of justice. The Second Circuit has thus allowed a hypothetical perception of injustice to bar the doors of the court to a plaintiff, thereby ensuring injustice.[24]

To date, no court has reviewed the alleged state secrets that allegedly counsel hesitation in this case. The Canadian Report indicates that Canada initially provided baseless information to U.S. officials about Arar[25] but subsequently corrected that information on multiple occasions while Arar was still in U.S. custody.[26] The FBI told the Canadians, the day after Arar was transferred to Syria, that they had no information that would allow them to hold Arar.[27] Despite this publicly available evidence that

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[24] The Second Circuit's concern about potential national security and state secrets issues ignores precedent addressing these issues. *See United States v. Reynolds*, 345 U.S. 1, 7 (1953) (discussing state secrets privilege, which requires the court to determine when to recognize the privilege); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[s]imply saying 'military secret,' 'national security,' or 'terrorist threat'... is insufficient to support the privilege").

[25] Canadian Report, p. 13 ("The RCMP requested that American authorities place lookouts for Mr. Arar and his wife, Monia Mazigh, in U.S. Customs' Treasury Enforcement Communications System (TECS). In the request, to which no caveats were attached, the RCMP described Mr. Arar and Dr. Mazigh as "Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement."[FN] The RCMP had no basis for this description, which had the potential to create serious consequences for Mr. Arar in light of American attitudes and practices at the time.").

[26] *Id.* at pp. 149 and 153.

[27] *Id.* at p. 154 (On October 8, an FBI official reported to Canadian intelligence officers that "the FBI did not have any information that would allow it to hold Mr. Arar.").

national security concerns were wildly exaggerated, the defendants' mere assertion of secrets and national security caused the Second Circuit to decline to recognize a cause of action. By adopting a standard that requires dismissal of *Bivens* causes of action whenever the executive has the foresight self-servingly to classify documents as secret and then assert national security concerns in court, the Second Circuit has created a test that requires the least scrutiny of the most serious allegations – those in which executive officials, such as the defendants here, detain and arrange for the torture of their victims while blocking their access to the courts.

The Second Circuit's analysis also precludes meaningful review by first misconstruing Arar's complaint as a challenge to "extraordinary rendition," thereby overlooking the constitutional violations that Arar actually alleges. The court then dismisses the claim based not on analysis of the defendants' constitutional violations but rather on whether issues raised by the defense "counsel hesitation" in recognizing a *Bivens* remedy.[28] The facts underlying Arar's "access to court" claim were readily available and publicly known. There were no alternative legal remedies. In subsuming Arar's claim under the rubric of "extraordinary rendition," the Second Circuit ignores the unconstitutional treatment to which Arar was allegedly subjected as a prelude to his being forcibly sent to Syria, a government known for torture. Under this decision, an executive officer concerned about being accused of a constitutional violation can avoid accountability for past misconduct merely by committing additional constitutional violations and having the victim shipped off to torturers in a foreign country.

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[28] *Arar*, 585 F. 3d at 574.

C. In Its *Bivens* "Special Factors" Analysis, the Second Circuit Abandons Its Proper Role as a Guardian Against Unconstitutional Executive Conduct

The Second Circuit asserts that a Bivens cause of action is reserved for those times when it is "easy to identify both the line between constitutional and unconstitutional conduct and the alternative course which officers should have pursued."[29] This standard is clearly met in this case. The decision that torture is unconstitutional is easy and the alternatives to torture are obvious.

In support of its conclusion that the determinations as to constitutionality and as to alternative conduct were difficult to identify, the Second Circuit rambles through a series of irrelevant choices (*e.g.*, "should the officers have let Arar go on his way and board his flight to Montreal?")[30] to demonstrate that the defendants did not have a clear constitutional path forward. This bit of rhetoric ignores the question at the heart of this case: Should the defendants have blocked Arar's access to court while arranging for his torture in Syria? The Constitution provides a clear answer: torture or complicity in torture is categorically forbidden by the Constitution, statutes, and treaties. *See Chavez v. Martinez*, 538 U.S. 760, 773 (2003) ("Our views... do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial"); *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (due process bars executive officials from employing their power as an "instrument of

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[29] *Id.* at 580.

[30] *Id.* at 572.

oppression" in a manner that "shocks the conscience of the court"); *Rochin v. California*, 342 U.S. 165, 166 (1952) (due process requires the state to observe "certain decencies of civilized conduct" and prohibits "methods too close to the rack and screw to permit of constitutional differentiation"); *Irvine v. California*, 327 U.S. 128, 133 (1954) ("coercion, violence or brutality to the person" which "shocks the conscience" violates due process); *Williams v. United States*, 341 U.S. 97, 101 (1951) ("[W]here police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution.").

A constitutional path forward was available to the defendants and was ignored: allowing Arar access to the courts and not torturing him. Instead, according to the complaint, the defendants unconstitutionally and illegally conspired to torture Arar in a misguided effort to produce intelligence on al-Qaeda. The role of an independent judiciary is not to empathize with imagined difficult decisions made by such defendants but to protect victims against constitutional violations. Our constitutional framework of government requiring a judicial check on such unconscionable executive actions protects the rule of law only when such checks are exercised by an independent judiciary.

CONCLUSION

This Court should grant the Petition for Certiorari, the decision of the Second Circuit should be reversed, and a *Bivens* remedy should be recognized for the reasons explained above.

Dated: March 4, 2010

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